

**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**

In re:	)	DNS-FAS Docket No. 08-0053
	)	
AWB LTD. and its Affiliated Companies,	)	
	)	
Petitioner	)	<b>Decision and Order</b>

This decision and order is issued pursuant to 7 C.F.R. § 3017.890 that governs appeals of debarment and suspensions under 7 C.F.R. §§ 3017.25-.1020, the regulations that implement a governmentwide system of debarment and suspension for the United States Department of Agriculture’s nonprocurement activities. The purpose of the regulations is stated at 7 C.F.R. § 3017.110:

- (a) To protect the public interest, the Federal Government ensures the integrity of Federal programs by conducting business only with responsible persons.
- (b) A Federal agency uses the nonprocurement debarment and suspension system to exclude from Federal programs persons who are not presently responsible.
- (c) An exclusion is a serious action that a Federal agency may take only to protect the public interest. A Federal agency may not exclude a person for the purposes of punishment.

AWB LTD has appealed the December 20, 2007 decision of Michael W. Yost, Administrator of the Foreign Agricultural Services (“FAS”), United States Department of Agriculture, to debar AWB and certain of its affiliates from participation in government programs for two years. AWB argues that the decision should be reversed and vacated because: (1) it is untimely and procedurally flawed; (2) it is invalid under 7 C.F.R. § 3017.890; and (3) it failed to consider the time AWB had already been suspended.

Upon consideration of the Administrator's decision, the underlying administrative record ("AR") and the arguments of the parties, I am affirming the two-year debarment of AWB LTD and the named affiliated companies as fully supported by the administrative record and the controlling regulations.

### **Findings**

Concerns about manipulation of the United Nations' Oil-For-Food Programme by Iraq while its government was headed by Saddam Hussein, led to the creation of an Independent Inquiry Committee Chaired by Paul A. Volker. On October 27, 2005, the committee issued a 623 page report. ("Volker Report"). It identified AWB Limited, an Australian company selling wheat to Iraq under United Nations authorized humanitarian goods contracts, as having paid kickbacks disguised as trucking fees, to Saddam Hussein's government. In a letter to Chairman Volker, dated October 25, 2005 and signed by both AWB's Managing Director and its Chairman, AWB stated that it did not know that the trucking fees it paid were to a company that was a front for the government and that the fees were not used to provide trucking services. (Volker Report at 395-399).

In response to the request of the Secretary-General of the United Nations, the Australian Government established its own Commission headed by The Honourable Terence RH. Cole AO RFD QC. This Commission employing Royal Commission powers, conducted an independent investigation and issued a report ("Cole Report") documenting corruption by Australian companies that participated in the U.N. Oil-For-Food Programme while Saddam Hussein was in power.

...(The Commission) worked tirelessly through 76 days of hearings, hundreds of witness statements and tens of thousands of pages of documents.

(Statement dated November 27, 2006, by the Attorney General, the Honorable Philip Ruddock MP., included as a preface to the Cole Report). The Cole Report's Prologue begins with the September 18, 2006 finding by Justice Young, Federal Court of Australia:

AWB knew that paying inland transportation fees to Alia (the Iraqi company used as a front) was a means of making payments to the Iraqi Government. This plan was concealed from the United Nations.

(Cole Report at xi). Commissioner Cole then stated his findings from the investigation of AWB's payment of kickbacks to the Saddam Hussein government:

I have examined in detail the transactions between AWB Limited and Iraq and the relationship of those transactions to United Nations sanctions and the law in Australia. The facts are now not in doubt. It is not my function to make findings of breach of the law; my function is to indicate circumstances where it might be appropriate for authorities to consider whether criminal or civil proceedings should be commenced, I found such circumstances to exist....

.... The Federal Court has found that a 'transaction was deliberately and dishonestly structured by AWB so as to misrepresent the true nature and purpose of the trucking fees and to work a trickery on the United Nations'....

How could AWB have conducted itself in such a way as to produce such consequences? I asked Mr. Lindberg, without objection from AWB or its directors, 'Are you able to give me any understanding as to how you think this came about? How it happened in a company like AWB?' Mr. Lindberg gave no answer other than to say that it should not have happened. AWB submitted that the question I asked was 'obviously a question the directors must consider and answer'.

I consider the answer obvious.

The conduct of AWB and its officers was due to a failure in corporate culture. The question posed within AWB was:

What must be done to maintain sales to Iraq?

The answer given was:

Do whatever is necessary to retain the trade. Pay the money required by Iraq. It will cost AWB nothing because the extra costs will be added into the wheat price

and recovered from the UN escrow account. But hide the making of those payments for they are in breach of sanctions.

No one asked, 'What is the right thing to do?' Instead, much time and money was spent trying to determine if arrangements could be formulated in such a way as to avoid breaching the law or sanctions, whether conduct could be protected, by various subterfuges, from discovery or scrutiny, and whether actions were legal or illegal. There was a lack of openness and frankness in AWB's dealing with the Australian Government and the United Nations. At no time did AWB tell the Australian Government or the United Nations of its true arrangements with Iraq. And when inquiries were mounted into its activities it took all available measures to restrict and minimize disclosure of what had occurred. Necessarily, one asks, 'Why?'

The answer is a closed culture of superiority and impregnability, of dominance and self-importance. Legislation cannot destroy such a culture or create a satisfactory one. That is the task of boards and the management of companies. The starting point is an ethical base. At AWB the board and the management failed to create, instill or maintain a culture of ethical dealing....

(Cole Report at xi-xii). Based on discussions with officers of AWB and the Saddam Hussein Iraq government, and a meticulous review of contracts, AWB's internal memoranda and other documents, the Commission ascertained that:

Between 1999 and March 2003 AWB paid in excess of US \$224 million in inland transportation fees, including the 10 per cent after-sales-service fee (where that fee was imposed), in respect of 28 contracts concluded under the Oil-for-Food Programme.

(Cole Report at 43 of Vol. 2).

On December 20, 2006, based on his review of the Cole Report, Michael W. Yost, Administrator of the Foreign Agricultural Service (FAS), suspended and proposed to debar AWB Limited indefinitely from participation in programs of the United States. Mr. Yost advised AWB of its right under the regulations, to submit information in opposition to the suspension and proposed debarment, and to do so by written submission or to request an opportunity to present information orally. In his concluding paragraph to AWB, Mr. Yost stated:

If I determine that a submission raises a genuine dispute over facts material to the suspension or the proposed debarment, AWB Limited, its affiliates or both will be afforded an opportunity to appear with a representative, present witnesses and other evidence, and confront any witnesses that the United States presents. After reviewing the official record, including any submissions by AWB Limited or its affiliates, I will decide, in accordance with the applicable regulations, whether to terminate the suspension and proposed debarment action or to impose debarment.

(AR at 1-5). AWB responded by a letter from its attorney dated February 16, 2007, challenging the evidentiary and legal basis for the proposed debarment, and requesting an oral hearing. (AR at 14).

On March 20, 2007, the request for an oral hearing was granted by a letter to AWB's attorney from Roy Henwood, Confidential Assistant to the Administrator. The letter advised that the hearing would be informal, would be transcribed, and that AWB's "...representatives, counsel or both may present additional arguments or information for the record, expand on arguments already offered, and present witnesses." It further advised that Constance Jackson, Associate Administrator of FAS would preside, and that Mr. Yost, the suspending and debarring official for FAS, would not be at the hearing.

Also, that Mr. Yost, as the suspending and debarring official, was:

...required to make a written decision whether to continue, modify, or terminate AWB's suspension or debar AWB within 45 days of closing the official record, although he may extend that period for good cause.

The closing paragraph of Mr. Henwood's letter stated:

You may find further information about the conduct of the hearing in 7 CFR part 3017, particularly in subparts G and H. If I may clarify any of the above information, I am available at (202) 720-5864 or at [roy.henwood@fas.usda.gov](mailto:roy.henwood@fas.usda.gov).

(AR at 27). On April 24, 2007, AWB's attorney supplemented his letter of February 16, 2007, stating that AWB would focus at the hearing on three subject areas of interest to the USDA. First, it had closed its United States office in Portland, Oregon.

Second, AWB's board of directors in keeping with its efforts to reform its corporate culture in wake of the Oil-for-Food-Programme investigations had implemented an "AWB Reform Agenda", and was seeking shareholder approval to split AWB into two separate companies. Third, the Australian Government was expected to announce shortly the results of its independent review of wheat export marketing arrangements. (AR at 29).

The transcribed oral hearing was held before Ms. Jackson on April 25, 2007. (AR at 41-91).

At the opening of the hearing, Ms. Jackson told the attorneys who appeared on behalf of AWB that it was her intention:

...to make sure there's sufficient opportunity to explore all the issues raised by all parties, and we're not going to be reaching a decision here at the hearing. This is information gathering. We'll take that information into consideration.

The record will be open for 30 days, a time period we may need to extend...Once the record is closed, there will be a written decision made within 45 days.

We're going to give you the first opportunity to present some information....

(AR at 44-45). The attorneys for AWB presented no evidence to deny its past payment of disguised kickbacks to the Saddam Hussein government as found and described in the Cole Report. Instead, they confined themselves to furnishing information to show that AWB should not be excluded from Federal programs because it no longer came within the "not presently responsible" standard of 7 C.F.R. § 3017.110 (b). They provided information showing that AWB now has a new managing director, a new executive staff and a new general counsel. They advised that AWB presently operates under the directives of a new managing director pursuant to policies instituted by him to transform the culture of the company and make it more transparent. They argued that the corrupt practices that were the subject of the Cole Report and the Volcker Report had

ended by 2003, and that none of the responsible individuals were still part of AWB's management. Moreover, the Board of Directors of AWB publicly expressed its regret for what happened. (AR at 49-51).

At the hearing, Ms. Jackson expressed concerns about AWB's Board of Directors. She inquired as to the turnover in the Board of Directors since the events that were the subject of the Cole Report, and what kind of training or reviews had been put in place for the Board to have more future accountability for the actions of the company. (AR at 53). The response to this question and a similar question by Mr. Henwood respecting fraud awareness training for AWB's staff, was:

I don't think there's been a separate program created for that - - for that purpose. I can inquire, but I don't - - I don't think there has been a sort of institutional program created that would be - - that would be dedicated to that - - to that single purpose. I don't know - - I don't know that the Board - - I don't know that the Board considers it necessary for anything. It certainly - - the Board certainly considered it efficient for the managing director to be given the - - the instructions to be quite proactive in making certain that there is a new openness within the company.

(AR at 55-56). Concerns were also expressed as to which members of the Board and the staff were the same as those in place in 2002. (AR 59).

The closing statement for AWB argued that its debarment would constitute punishment that is not allowed by 7 C.F.R. § 3017.110 (c) in that there was a lack of evidence necessary under 7 C.F.R. § 3017. 800 (d) for debarment based on a cause of so serious or compelling nature that the national interest is imperiled or that the company's present responsibility is affected. (AR at 80).

On May 11, 2007, FAS wrote to counsel for AWB requesting: (1) an explanation of facts that had come to its attention that could serve as an independent cause for AWB's

debarment due to inappropriate business conducted with Iran; and (2) information respecting a company that might have been an AWB affiliate. (AR at 92-93).

On May 23, 2007, counsel for AWB sent Ms. Jackson additional information that included AWB's annual report for 2006 devoted to Corporate Governance, and rosters of its executive officers and its directors from 2002 through May 1, 2007. As part of this submission, information was supplied to demonstrate AWB's present responsibility through its giving a power-point presentation and distributing materials to its employees under two working versions of a "Values workshop", and by AWB's response to recommendations from KPMG, an entity it commissioned to report on the company's existing governance structures and practices. (AR at 96-173).

Also on May 23, 2007, counsel for AWB responded to the FAS letter of May 11, 2007. (AR at 94-95).

The explanations provided for AWB in respect to dealings with Iran were found satisfactory by FAS and it so advised AWB's counsel by a letter dated July 3, 2007. However, in the letter, FAS requested additional information concerning a possible AWB affiliate. (AR at 174).

On July 16, 2007, counsel for AWB submitted information respecting the possible affiliate. (AR at 175-337). By letter dated August 17, 2007, Ms. Jackson advised that the explanations provided were satisfactory. (AR at 338).

On October 3, 2007 and October 12, 2007, counsel for AWB requested that the suspension of AWB and the proposed debarment be vacated because the record had closed on July 16, 2007, and under 7 C.F.R. § 3017.870(a) the mandatory 45-day period in which to make a decision had passed. (AR at 339 and 340).



On October 15, 2007, Mr. Henwood responded to these letters and stated that the official record had not yet closed because findings of fact as contemplated by the regulations, had not yet been presented to the Administrator. (AR at 341).

On November 12, 2007, AWB filed a Petition that was assigned to me, requesting a declaratory order to vacate the December 20, 2006 Notice of Suspension and Proposed Debarment and terminating the proceedings for procedural irregularities and lack of timeliness. (DNS FAS Docket No. 08-0016).

On November 16, 2007, Ms. Jackson issued findings of fact pursuant to 7 C.F.R. § 3017.745(a)(2) and 3017,840(a)(2), that closed the official record. (AR at 345-351).

On December 17, 2007, I dismissed AWB's petition without prejudice. The dismissal was based on my lack of jurisdiction. As stated in that decision, an Administrative Law Judge's powers are limited to those set forth at 7 C.F.R. §§ 3017.765 and 3017.890 which do not authorize a proceeding to be vacated before the issuance of a debarring official's decision. (DNS FAS Docket No. 08-0016).

On December 20, 2007, Michael W. Yost, Administrator of FAS, and "the debarring official" as defined in 7 C.F.R. § 3017.935(a), debarred AWB Limited and named affiliates from participation in programs of the United States Government for a period of two years. (AR at 353-367).

On January 25, 2008, AWB filed an appeal from the Debarment Decision.

On March 31, 2008, FAS filed: (1) a motion to dismiss the appeal, (2) the appearance of its counsel, (3) the transmitted record on appeal, and (4) a declaration of Michael W. Yost in which Mr. Yost explained that acting as the debarring official:

... I considered a three-year debarment to be appropriate. However, in light of the one year during which AWB had already been suspended, I determined that a two-year debarment should be imposed.

On April 18, 2008, AWB filed a Reply Brief in Support of its Appeal from the Debarment Decision.

### Conclusions

- 1. The debarment decision that was issued on December 20, 2007 was timely and within 45 days after the official record was closed as specified in the controlling regulation, in that the official record was not closed until the receipt by the debarring official of findings of fact on November 16, 2007.**

AWB's contention that the debarment decision was untimely is based on inapplicable legal precedents, mischaracterizations of statements by the Administrator and other FAS officials, and its assertion that the hearing held at its request was not a "Fact Finding Proceeding" under 7 C.F.R. §§ 3017.830(b)-(c) and 3017.840(a)(2).

The regulation that controls whether a debarment decision is timely is 7 C.F.R. § 3017.870(a) that provides:

- (a) The debarring official must make a written decision whether to debar within 45 days of closing the official record. The official record closes upon the debarring official's receipt of final submissions, information and findings of fact, if any. The debarring official may extend that period for good cause.... (emphasis added).

This regulation, together with 7 C.F.R. § 3017.755 that sets forth an identical requirement for suspension decisions, was promulgated on November 26, 2003 (68 FR 66544, 66563 and 66565). The new regulations replaced earlier regulations that had been interpreted and applied in the 1994-1997 Agriculture Decisions that AWB has cited to urge that the 45-day period the debarring official had for his issuance of his decision started before his receipt of findings of fact.

In addition to arguing that the debarment decision was not issued within the 45-day period contemplated by the regulations, AWB urges that the debarment was not conducted "...in a reasonably expeditious manner consistent with the regulations or principles of fundamental fairness." That was the stated reason for vacating a debarment decision by a USDA agency in *In re Indeco Housing Corp.*, 56 Agric. Dec. 738, 743 (1997). But the circumstances underlying the *Indeco* decision were vastly different from those in the instant proceeding. The Respondent in *Indeco* had been debarred under procedures that took almost a year and a half to complete; was not properly served with notice of the proposed debarment; was not allowed to submit information and argument after first learning of the proposed debarment at a bankruptcy hearing; and was debarred for five years, a period in excess of the three year general maximum, without explanation. In contrast, the challenged decision to debar AWB was issued only after AWB was given every opportunity to contest the proposed debarment and show itself to be presently responsible.

Here, Ms. Jackson conducted the oral hearing AWB had requested. She and the Administrator allowed and invited AWB to submit additional information after the hearing. FAS continued to receive information from AWB through July 16, 2007, when its counsel explained by letter of that date, AWB 's relationship with another company that appeared to be an affiliate. FAS wrote back on August 17, 2007 to advise that the explanations given in the July 16, 2007 letter respecting its relationship with the company that appeared to be an affiliate, were found to be satisfactory. About 90 days later, on November 16, 2007, Ms. Jackson issued Findings of Fact that had required her to review and analyze not just the transcribed hearing record, but voluminous written submissions

by AWB's counsel, the 623 page Volker report, and the five volume, over 2000 page, Cole Report. The Administrator then evaluated those findings and materials, and issued his decision on December 20, 2007, 34 days later. In sum, FAS was required to assimilate and analyze a huge mass of information, and my review shows that it did so in a most workmanlike and expedient manner that was in every sense fair to AWB.

AWB's argument that the decision was not issued within 45 days after the close of the hearing is contrary to the present controlling regulations. An official record does not close until after the debarring official has received findings of fact. Nothing in the communications between AWB's counsel and the Administrator, or other FAS officials modified this provision.

At the time AWB's request for an oral hearing was granted, the Administrator's Assistant directed AWB's counsel to the regulations that would control the hearing's conduct, and gave him his telephone number and e-mail address if any clarification was needed. (AR at 27).

None of the subsequent communications from FAS relied upon by AWB eliminated the receipt of findings of fact as a needed step before the official record would close.

In his July 2, 2007 letter to AWB's attorney seeking additional information about a possible AWB affiliate, Mr. Yost merely stated:

Once we have satisfied ourselves that the venture has been established with independent control, we will be able to close the record.

This statement hardly implied that Mr. Yost would dispense with his receipt of findings of fact from Ms. Jackson, the person who actually presided over the hearing, before preparing his decision.

Nor is there such an implication in the FAS letter of August 17, 2007 that acknowledged the receipt of requested information about a possible AWB affiliate, and then stated:

FAS has reviewed your correspondence...and is satisfied with the explanations contained therein relative to the RD1 joint venture between AWB and Fonterra....

AWB's third argument that the debarment decision was untimely is that the hearing held at its request was "...simply a 'Presentation in Opposition' under § 3017.835, not a 'Fact Finding Proceeding' under §§ 3017.830(b)-(c) and 3017.840(a)(2)". (Appeal at 26). This argument is baseless. The governing regulations do not provide for different types of hearings. When AWB's counsel requested an oral hearing in his letter of February 16, 2007, AWB was afforded just that. It was a hearing to determine facts. It had no other purpose. AWB was invited to present witnesses. The hearing had a presiding officer and was transcribed. It was of course informal as the regulations require. The regulations also require that when fact-finding is conducted:

The fact-finder must prepare written findings of fact for the record.

(7 C.F.R. § 3017.840 (b)). Upon the fact finder so doing and sending her findings of fact to the debarring official, the official record then closed. Within 45 days of that event, the debarring official then issued a timely decision in accordance with the governing regulation.

- 2. The debarment decision may not be vacated under 7 C.F.R. § 3017.890 since the administrative record shows it to be in accordance with law, based on the applicable standard of evidence, and is not arbitrary, capricious and an abuse of discretion.**

The debarment is based upon the debarring official's determination that a cause of action exists of so serious or compelling a nature that it affects the present responsibility

of AWB and named affiliates to participate in programs of the United States Government. (AR at 353). This is a stated ground for debarment under 7 C.F.R. § 3017.800(d).

AWB argues that the ground does not apply because its conduct does not reach the “conviction or civil judgment” standard of § 3017.800(a). AWB is in effect contending that since it has not as yet been convicted of the corrupt practices that its officers admitted during the course of the Cole investigation, it is premature to debar it from participation in contracts with the Federal Government. It supplies no legal precedent in support of this premise. Debarment proceedings based on section 3017.800(d) often involve conduct that could be construed as criminal or serve as grounds for a civil judgment. In the words of the regulation itself, a person may be debarred for:

Any other cause of so serious or compelling a nature that it affects...present responsibility.

(7 C.F.R. § 3017.800(d)). Acceptance of AWB’s argument would mean that the government must continue to do business with persons whose actions show them to be untrustworthy and irresponsible until after they are actually convicted of a crime or have a civil judgment entered against them. If accepted, this argument would vitiate the basic purpose of suspensions and debarments to “... ensure the integrity of Federal programs by conducting business only with responsible persons.” (7 C.F.R. § 3017.110(a)). It is therefore rejected.

Hearsay evidence is customarily allowed in administrative proceedings. The Cole Report contains admissions by AWB officers and members of the Saddam Hussein government proving that AWB engaged in corrupt and reprehensible practices that it at first denied. Moreover, as stated in the Debarment Decision:

AWB submitted no evidence to FAS to deny any information, facts or findings contained within the Volcker Report or the Cole Report and, therefore, such information, facts and findings were adopted within the findings of fact.

(AR at 361). In every sense, AWB's conduct and practices were in the words of the regulation "of so serious or compelling nature that it affects...present responsibility."

FAS having met its burden of proving a cause for debarment, AWB had the burden of demonstrating itself to be presently responsible and that debarment is not necessary:

Once a cause for debarment is established ...a respondent...(has) the burden of demonstrating to the satisfaction of the debarring official that..(the respondent is) presently responsible and that debarment is not necessary.

(7 C.F.R. § 3017.855(b)). The Administrator's determination that a three year debarment, reduced to two years in light of the one year of suspension, is completely reasonable. Though AWB submitted information to show it has taken positive action to change its management personnel and corporate policies since it ended its participation in the Oil-For-Food Programme("OFFP"), the Administrator found insufficient evidence that the corporate culture that allowed and fostered the wrongdoing has been fully transformed. He listed five factors of concern:

(1) AWB did not institute serious changes in its management until the issuance of the Volcker Report and the establishment of the Cole Commission.

(2) Several members of AWB's Board of Directors, as of May 1, 2007, were on the Board during the period of AWB's participation in the OFFP.

(3) Counsel for AWB has indicated that procedures for ethical business practices and transparent governance have been adopted by AWB; however, as of the date of the issuance of the findings of fact, AWB had not submitted proof that it has actually implemented these procedures.

(4) AWB had not acted to amend its constitution, as of May 23, 2007, to act on some of KPMG's recommendations to improve its internal corporate governance.

(5) During the additional proceedings, Mr. McDermott (AWB's counsel) stated that he didn't think that AWB had created a separate institutional program dedicated to the purpose of providing fraud awareness to its staff.

(AR at 362). These are important concerns, and it is reasonable under all the circumstances to impose a debarment for three years less the one year period of suspension, to be fully assured that a company that engaged in such reprehensible conduct has truly reformed and is now presently responsible. This is not punishment; it is appropriate action taken by the debarring official in applying the various factors set forth in 7 C.F.R. § 3017.860(a)-(s).

**3. The Debarment Complies with 7 C.F.R. § 3017.865(b).**

A debarring official is required by 7 C.F.R. § 3017.865(b) when determining the period of debarment to consider the length of time a suspension was in effect. Mr. Yost did so and has furnished his declaration to that effect.

**Order**

The decision of the debarring official is affirmed.

This order shall take effect immediately. This decision is final and is not appealable within USDA. 7 C.F.R. § 3017.890(d).

Copies of this Decision and Order shall be served upon the parties.

Dated: April 21, 2008

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Victor W. Palmer  
Administrative Law Judge